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No. 81-693

In the Supreme Court of the United States

OCTOBER TERM, 1981

HULLINGHORST INDUSTRIES, INC., PETITIONER

v.

DAVID E. CARROLL AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a worker injured while erecting a scaffold to be used in repairing a turntable utilized in the loading and unloading of vessels was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act at the time of injury.

2. Whether the status of an injured claimant's employer as an "employer" within the meaning of Section 2(4) of the Act may be based on the fact that the claimant himself meets the coverage requirements of Sections 2(3) and 3(a) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 650 F. 2d 750. The opinions of the Benefits Review Board (Pet. App. 29-36, 69-75) are reported at 7 B.R.B.S. 538 and 12 B.R.B.S. 401. The opinion of the administrative law judge (Pet. App. 19-28) and his opinion on remand from the Benefits Review Board (Pet. App. 39-53) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1981. The petition for a writ of certiorari was filed on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. BASF Wyandotte Corporation owns and operates a port facility along the Mississippi River in Geismar, Louisiana (Pet. App. 2). Respondent David E. Carroll was employed by petitioner Hullinghorst Industries, Inc., the scaffolding contractor at the Wyandotte port facility. The sole function of petitioner and its employees was to erect scaffolding for whatever purpose needed at the port facility (*ibid.*). Carroll was injured in the course of his employment on December 12, 1972, while erecting a scaffold beneath a pier extending over the Mississippi River (*id.* at 2, 48). The purpose of the scaffold was to provide a place for Wyandotte employees to stand while repairing a turntable used in the loading and unloading of vessels that had been damaged by a ship. Carroll was not to be involved in the actual repair of the turntable.

2. Respondent Carroll filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The administrative law judge found that Carroll was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. 27-28). The administrative law judge also found that petitioner was not an "employer" within the meaning of Section 2(4) of the Act, 33 U.S.C. 902(4) (Pet. App. 27 n.3).

The Benefits Review Board reversed the administrative law judge's decision and remanded the case for determination of the amount of compensation due (Pet. App. 29-36). The Board noted that Carroll's job was "building a scaffold to facilitate repair of cargo handling equipment" and stated that "the scaffold was an 'essential aspect' of the business of loading and unloading ships at Wyandotte's pier. Accordingly, [Carroll] is an employee under Section 2(3) of the Act" (*id.* at 35).

On remand, the administrative law judge found that Carroll was injured in the course of his employment with petitioner and was permanently and totally disabled (Pet. App. 39-54). The Board sustained the administrative law judge's decision and award of compensation (*id.* at 69-77).

3. Petitioner sought judicial review, and the court of appeals affirmed the Board's decision (Pet. App. 1-17). The court stated that the Fifth Circuit "has made it clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' as that term is used in the Act" (Pet. App. 8). The scaffolding project on which respondent Carroll was working when he was injured was "indisputably maritime in nature," the court held, because the project "was part of the ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships" (*ibid.*).

The court of appeals rejected petitioner's contention that, because Carroll was not to play a "direct" role in the actual turntable repair work, this case was distinguishable from previous cases in which employees engaged in maintenance and repair work were held to be engaged in maritime employment. The court stated (Pet. App. 8-9):

> Carroll's work in erecting the scaffolding was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. It was not merely "incidental" to that project, see *Dravo Corp.* v. *Banks*, 567 F. 2d 593, 595-96 (3d Cir. 1977) unskilled laborer spreading salt on ice at shipyard not engaged in maritime employment), nor was it the type of job "peripherally related to maritime matters that Congress said was not to be covered by the LHWCA, such as tran-shipment of stored cargo or clerical work," see *Odom Construction Co.* v. *United States Dep't of Labor*, [622 F. 2d 110,

113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981)]. It was an integral step in a maritime project of the type that could be performed by a typical harborworker. See *id.* at 112. It directly furthered the maritime goals of the Wyandotte port facility—the loading and unloading of ships. See *Trotti & Thompson* v. *Crawford* [631 F. 2d 1214, 1220 (5th Cir. 1980)]. It clearly bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters'. . . ." *Odom Construction Co.* v. *United States Dep't of Labor, supra,* 622 F. 2d at 113. That the skills utilized by Carroll were "essentially nonmaritime" in character is immaterial. It is the purpose of the work that is the key; "nonmaritime" skills applied to a maritime project *are* maritime for purposes of the "maritime employment" test of the Act. *Mississippi Coast Marine* v. *Bosarge,* 637 F. 2d 994, 997-98 & n.7 (5th Cir. 1981); *Trotti & Thompson* v. *Crawford, supra,* 631 F. 2d at 121 nn.15, 16. *See Odom Construction Co.* v. *United States Dep't of Labor, supra,* 622 F. 2d at 112-13.

The court of appeals also rejected petitioner's contention that maintenance and repair of maritime facilities comes within the "maritime employment" status requirement of the Act only when an injured worker's own employer uses the facilities for maritime purposes. Noting that it had rejected a similar argument with respect to the situs requirement of Section 3(a) of the Act, 33 U.S.C. 903(a), in *Odom Construction Co.* v. *United States Department of Labor, supra,* the court stated: "Nothing in the language of the Act * * * would suggest a requirement that an employee injured in what would otherwise be considered maritime employment would nevertheless be barred from recovery because his employer was performing functions that were an integral part of indisputably maritime activity that was

conducted by *another*, and not by the employer itself" (Pet. App. 11-12; emphasis in original).

Finally, the court of appeals rejected the contention that petitioner is not a statutory employer within the meaning of Section 2(4) of the Act, 33 U.S.C. 902(4). Section 2(4) defines an "employer" as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *." The court noted that the "employer" status requirement for coverage had more significance before the LHWCA was amended in 1972 (Pet. App. 13). Prior to 1972, the court explained, the Act had no "employee" status requirement; a claimant was eligible for compensation even if he was not engaged in maritime employment, so long as he was injured upon the navigable waters of the United States and his employer had at least one worker engaged in maritime employment (*ibid.*). However, with the enactment of the 1972 amendments, the claimant himself must be engaged in maritime employment in order to meet the coverage requirement of Section 2(3). Thus, the court noted, if a claimant meets the status requirement of Section 2(3) and the situs requirement of Section 3(a), the claimant's employer automatically qualifies as an "employer" within the meaning of Section 2(4) (*ibid.*).

ARGUMENT

1. The decision of the court of appeals that respondent Carroll was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA is correct and does not conflict with the ruling of any other circuit. Even if a "significant relationship to navigation and commerce" were an indispensable component of "maritime employment" under Section 2(3)—and we do not believe it is—Carroll's work would satisfy the statutory requirement.

The court of appeals decided that Carroll was "engaged in maritime employment" because the work he was performing when he was injured "was part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships," and "was indisputably maritime in nature" (Pet. App. 8). This decision is unassailable, for as the court noted, the cases interpreting Section 2(3) have established that maintenance and repair of maritime equipment and facilities are covered by the LHWCA.[1]

Petitioner concedes (Pet. 11) that the courts have held that workers engaged in maintenance and repair of maritime facilities are covered by the Act, but it contends (Pet. 10-13) that Carroll is not covered because he was simply performing carpentry work and was not engaged in repairing longshoring equipment. However, as the court of appeals noted, petitioner's distinction is one of no consequence: "Carroll's work in erecting the scaffolding was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. * * * It directly furthered the maritime goals of the

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[1]See, *e.g.*, *Odom Construction Co.* v. *United States Department of Labor*, 622 F. 2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Texports Stevedore Co.* v. *Winchester*, 554 F. 2d 245, 247 (5th Cir.), modified in part on rehearing on other grounds, 561 F. 2d 1213 (5th Cir. 1977), aff'd on rehearing en banc on other grounds, 632 F. 2d 504 (5th Cir. 1980), cert. denied, No. 80-1549 (June 1, 1981); *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess*, 554 F. 2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F. 2d 30, 37-38 (1st Cir. 1980), cert. denied, 80-1609 (June 15, 1981); *Price* v. *Norfolk & Western Ry.*, 618 F. 2d 1059, 1061, 1062 (4th Cir. 1980); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 140-141 (9th Cir. 1978).

Wyandotte port facility—the loading and unloading of ships" (Pet. App. 8-9). This decision is plainly correct.[2]

2. Petitioner erroneously contends (Pet. 12-15) that the "employer" requirement of Section 2(4) of the Act is a separate test of coverage and that it is not an "employer" within the meaning of Section 2(4) because Carroll is its only nexus with maritime activity. As the court of appeals noted (Pet. App. 13), the "employer" requirement had more significance under the original LHWCA, because an employee injured on navigable waters was covered by the original Act even if he was not engaged in maritime employment, so long as his employer had at least one worker engaged in maritime employment. However, the addition of the "maritime employment" status requirement for employees in the 1972 amendments to the Act has

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[2]Petitioner's reliance (Pet. 12), on *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981), is misplaced. The Second Circuit in *Fusco* denied coverage to marine construction workers because the ultimate purpose of the construction project—a sewage treatment plant—did not have a "significant relationship to navigation or to commerce on navigable waters" (622 F. 2d at 1113). See also *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (2d Cir. 1981). We do not agree with the Second Circuit's decision (see Petition for a Writ of Certiorari, *Director, Office of Worker' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (filed Nov. 12, 1981)); however, it is obvious that even the Second Circuit would conclude that respondent Carroll was "engaged in maritime employment," for the ultimate purpose of his work—repair of longshoring equipment—is indisputably maritime. Cf. *Arbeeny* v. *McRoberts Protective Agency*, 642 F. 2d 672, 675 (2d Cir. 1981), cert. denied, No. 80-2180 (Oct. 5, 1981). Likewise, the Fourth Circuit's decision in *Conti* v. *Norfolk & Western Ry.*, 566 F. 2d 890 (1977), provides no support for petitioner's position. The brakemen held not to be covered in *Conti* were involved in unloading coal from railroad cars into receiving bins where the coal awaited transfer into vessels at an inland terminal. This activity was only peripherally related to maritime work, whereas Carroll's work at the time he was injured was an integral part of a maritime equipment repair project.

rendered the "employer" requirement "largely tautological" (*id.* at 13). In order to be covered by the amended LHWCA, a claimant must himself be "engaged in maritime employment" within the meaning of Section 2(3). Thus, an employer with an employee who meets the status requirement of Section 2(3) and who was injured on a maritime situs as defined in Section 3(a) is automatically an "employer" within the meaning of Section 2(4). See *Walter Tantzen, Inc.* v. *Shaughnessy*, 624 F. 2d 5 (2d Cir. 1980).

The legislative history of the 1972 amendments does not, as petitioner suggests (Pet. 14), support its contention. While the legislative history indicates that "an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered" (S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972)), nothing in the legislative history or in case authority indicates that the "employer" requirement may not be satisfied by the maritime "employee" status of the injured claimant. As this Court stated in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 74 (1979), "[t]o be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains injury on the situs defined by § 3(a)." There is no additional requirement under Section 2(4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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